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Supreme Court of the United States

October Term, 1940.

No. 326

JOHN F. CORCORAN,
Appellant,

vs.

CITY OF CHICAGO.

PETITION OF APPELLANT FOR REHEARING.

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PETITION OF APPELLANT FOR REHEARING.

If the Court please:

On October 14, 1940, the Court entered an order dismissing this appeal for want of a properly presented substantial federal question. By this petition for rehearing appellant asks the Court to reconsider its order dismissing the appeal and to order a full hearing of the case.

In the Court's order the cases cited by the Court are divided into three groups as follows: (1) Cases holding

that the federal question must be presented to the state court. (2) Cases in which the Ordinance of 1787 is held not to be applicable. (3) Cases in which the Seventh Amendment is held not to apply to state courts. We wish briefly to state our grounds for rehearing under each of these headings.

(1) The Federal Question in This Case Was Set Up in the State Court and Adjudicated Against the Appellant By the Judgment of the Supreme Court of Illinois.

We have presented in our statement as to jurisdiction (pages 6 to 16) quite fully the question, now being discussed, of the method of raising the federal question in the state court, and the way in which the federal question was passed upon by the Supreme Court of Illinois.

The question was raised by a statement of errors in the Supreme Court of Illinois, in pursuance of rule 39 of that court (370 Ill., p. 44).

There is no longer in force in the State of Illinois the old rule as to assignments of errors. In lieu of the old assignment of errors, rule 39 of the Illinois Supreme Court provides that in appellant's printed brief: "The concluding subdivision of the statement of the case shall be a brief statement of the errors or cross-errors relied upon for a reversal or of the cross-errors submitted by an appellee not prosecuting a cross-appeal. * * * The argument shall be confined to a discussion and elaboration of the points contained in the brief." There is no other assignment of errors required or permitted in the courts of review of the State of Illinois, than "as required in rule 39". Rule 36 (2) provides: "No assignment of errors or of cross-errors shall be necessary, except the statement in the brief, at the conclusion of the statement of the case, of the errors relied upon for reversal, as required in

rule 39." For Rules of the Supreme Court of Illinois on this point, please see 370 Ill. pp. 13, 39 and 44.

Our brief in the Supreme Court of Illinois, at pages 8 and 9, complied with the Rules of that court, where the formal statement of errors relied upon for reversal is in part as follows:

"That provision of the Civil Practice Act namely: 'Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case,' we maintain is invalid and unconstitutional when it is applied to a case in which a jury has rendered a verdict based on conflicting evidence, and the verdict approved by the trial judge.

"It is our contention that the case having been properly submitted to the jury, and the jury having found a verdict in favor of plaintiff, based upon sufficient evidence, and the trial judge who, as well as the jury, participated in the trial and saw the witnesses and heard them testify, having overruled the defendant's motion for a new trial, defendant's right to a review of the facts was exhausted, and the judgment as far as the facts are concerned is final."

In our argument in the same brief at page 44, we elaborate the formal statement of errors as is permitted by said rule 39, above quoted, in regard to the Ordinance of 1787, in part as follows:

"Our contention is that the provisions of the Ordinance of 1787, in regard to the right of trial by jury, and of judicial proceedings according to the course of the common law, are embodied in the Constitution of 1818 and the subsequent constitutions of the State, and are a part of the fundamental law of the State."

And at page 47 of our brief and argument, we elaborate the formal statement of errors in regard to the Seventh Amendment to the Federal Constitution, in part as follows:

"Even if the limitation of the modes of re-examining facts in a case once tried by jury, as they existed at common law, was not an essential part of the right to trial by jury at common law (and there is no logical reason for holding that the method of review was not a very essential and substantial part of the right) it became an essential part of the right of trial by jury in the territorial possessions of the United States, a part of which in 1818 became the State of Illinois, upon the adoption of the Seventh Amendment to the Federal Constitution in 1790, and the right to trial by jury as it existed in the Northwest Territory in 1818 is the right to trial by jury declared to be inviolate by the Illinois Constitutions of 1818, 1848 and 1870."

The question of the constitutionality of the statute was the principal question passed upon in the opinion of the Supreme Court of Illinois and the question was decided adversely to appellant. It is true that that Court did not specifically mention our contentions under the Constitution and laws of the United States, but this Court has frequently held that the state court cannot in this way bar the right to present a federal question to this Court, where by the judgment of the state court, the right claimed, was denied.

C. B. & Q. R. R. Co. v. *Chicago,* 166 U. S. 226, 231;

Bryant v. *Zimmerman,* 278 U. S. 63, 67;

Sully v. *American Nat. Bk.,* 178 U. S. 290, 298.

There is nothing contrary to appellant's position in the cases cited by this Court in its *per curiam* memorandum

opinion. This Court in *Cleveland & Pittsburgh R. Co.* v. *Cleveland*, 235 U. S. 50, 53, says: "The Federal right must have been set up and adjudicated against the claimant by the judgment of the state court. It is equally well settled that the contention made and passed upon in the state court cannot be enlarged by assignments of error made to bring the case to this court." With this statement we have no dispute and in the instant case the right was set up and adjudicated against the appellant and the contention has not been enlarged by assignments of error in this court. In the *Cleveland & Pittsburgh R. Co.* case, the federal right set up in the state courts was an alleged change of decision in the Supreme Court of Ohio in violation of the contract clause of the Federal Constitution, while the federal right claimed in this Court was that the contract rights were impaired by subsequent legislation. The federal right claimed by appellant in the instant case was the same in the state court as it is in this Court.

In *Hiawassee Power Co.* v. *Carolina-Tenn. Co.*, 252 U. S. 341, a federal question was raised in the trial court on the admission of evidence, but the federal question relied upon in this Court was the invalidity of a statute of the state of North Carolina, but this Court says at page 343: "In the Supreme Court of the State no mention was made of it in the assignment of errors; nor was it, so far as appears by the record, otherwise presented to or passed upon by that court. The denial of the claim was specifically set forth in the petition for the writ of error to this court and in the assignment of errors filed here. But obviously that was too late."

In *White River Co.* v. *Arkansas*, 279 U. S. 692, a federal question was raised and passed on by this Court adversely to the plaintiff in error. A second federal question was also sought to be presented to this Court. However, the

Court says at page 700: "It does not appear, however, from the record that this constitutional question was presented in or passed upon by the Supreme Court of the State; and as it was sought to raise this question for the first time by assignments of error in this Court, it is necessarily excluded from our consideration."

We submit that the federal question was properly raised by appellant in the Supreme Court of Illinois, and that if this Court finds that a substantial federal question is involved in the instant case, the Court should grant a full hearing.

(2) The Ordinance of 1787, As It Affects the Statute in Question, Is in Force in Illinois Today.

In our statement as to jurisdiction (pages 16 to 19) and our brief opposing motion to dismiss or affirm (pages 3 to 44), we discussed at length this question. We feel that this appeal was dismissed primarily because of the error into which the Court fell as to whether appellant had properly raised the federal question in the state court, and that the Court upon a full consideration of the case will be convinced of the truth of the proposition contained in the above heading. We will briefly point out wherein the three cases cited on this point by this Court are not applicable to the instant case.

That the case of *Escanaba & Lake Michigan Co.* v. *Chicago*, 107 U. S. 678, is not an authority against the present validity of the Ordinance of 1787, please see the later case of *Cardwell* v. *American Bridge Co.*, 113 U. S. 205, in which the opinion was written by Mr. Justice Field who also wrote the opinion in the *Escanaba* case. The Court said at page 212, in referring to the *Escanaba* case:

"In that case all the bridges over the Chicago River had draws for the passage of vessels, and we there held

that a bridge constructed with a draw could not be regarded within the Ordinance of 1787 as an obstruction to the navigation of the stream. *We were not required to express any further opinion as to the meaning of the Ordinance.*" (Italics ours.)

In the much later case of *Economy Light Co.* v. *U. S.*, 256 U. S. 113, decided in 1921, this Court holds that part of Art. IV of the Ordinance of 1787 still has the force of law in the State of Illinois, and the Court says at page 121: "Nothing inconsistent with this was decided in *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 688, 689."

In *Huse* v. *Glover*, 119 U. S. 543, Mr. Justice Field again writing the opinion, the Court refers to the *Escanaba* case at length and concludes as follows at page 547: "We also held, in that case, that independently of these considerations the terms of the Ordinance [of 1787] were not violated because the navigable streams were subject to such crossings as the public necessities and convenience might require."

It thus appears from the three decisions of this Court later than the *Escanaba* case that what was said in the *Escanaba* case at page 688 in regard to the Ordinance of 1787 was pure *dictum*.

We have considered the *Escanaba* case at length in our brief opposing the motion to dismiss or affirm (pages 31-39), and we believe that our conclusion is correct when we say "If counsel for the City of Chicago are looking for authority of this Court to support them in the instant case, they will have to seek further than *Escanaba Co.* v. *Chicago*."

In *Permoli* v. *First Municipality*, 3 How. 589, the second case cited under this heading in its memorandum opinion, this Court says at page 610:

"What the force of the ordinance is north of the Ohio, we do not pretend to say, as it is unnecessary for the purposes of this case." (Italics ours.)

The *Permoli* case arose in the State of Louisiana, to which the provisions of the Ordinance of 1787 were extended by act of Congress, but the provisions of the Ordinance of 1787 were not there a "compact between the Original States and the people and states in said territory, and forever [to] remain unalterable, unless by common consent" as the provision of the Ordinance, now invoked by us, was and is in the State of Illinois.

The third case on this point cited by the Court in its memorandum opinion is *Cincinnati* v. *L. & N. R. R. Co.*, 223 U. S. 390, 401. This case is cited by us in our brief opposing motion to dismiss or affirm (p. 12) where we say concerning the case just cited:

"*Cincinnati* v. *L. & N. R. R. Co.*, 223 U. S. 390, decided in 1912, where the court says at page 401:

'But the ordinance of 1787 as an instrument limiting the powers of government of the Northwest Territory, and declaratory of certain fundamental principles which must find place in the organic law of States to be carved out of that Territory, ceased to be, in itself, obligatory upon such States from and after their admission into the Union as States, *except in so far as adopted by such States and made a part of the law thereof.*' (Italics ours.)

"Both the principal cases cited by appellee in its statement on this subject [and now cited by this Court in its memorandum opinion] the *Permoli* and *Escanaba* cases, contain similar statements to this. (3 How. p. 610; 107 U. S. p. 688.) Also, *Huse* v. *Glover*, 119 U. S. 543, 546, and *Sands* v. *Manistee etc. Co.*, 123 U. S. 288, 295."

In the instant case the United States imposed as a condition for admission upon the new State of Illinois, the provisions of the Ordinance of 1787, and the State of Illinois voluntarily adopted the provisions of the Ordinance as a part of its Constitution and fundamental law, and these provisions that the inhabitants of that state should always be entitled to the benefits of the trial by jury, and of judicial proceedings according to the course of the common law, thus became law of binding force in the new state. And this adoption of these provisions of the Ordinance of 1787 was made by the most solemn compact between the original states and the people and states in the Northwest Territory that these provisions of the Ordinance should "forever remain unalterable, unless by common consent."

In all three of the cases cited in the memorandum opinion under heading (2) is the statement, in substance, that the provisions of the Ordinance of 1787 are not in effect in the new state except insofar as adopted by such states and made a part of the law thereof. (3 How. p. 610; 107 U. S. p. 688; 223 U. S. p. 401.) This very thing was done by the State of Illinois, in the instant case. The preamble to the Constitution of Illinois of 1818 recites: "The people of the Illinois territory, having the right of admission into the government as a member of the Union consistent with the Constitution of the United States, the ordinance of Congress of 1787, and the law of congress approved April 18, 1818." (Ill. R. S. 1939, p. 25.)

In our brief opposing the motion to dismiss or affirm, and in our statement as to jurisdiction, we have cited many cases, holding in effect that the provisions of the Ordinance of 1787 such as the one now invoked by us providing that the inhabitants of the State of Illinois should "always be entitled to the benefits of • • • the

trial by jury * * * and of judicial proceedings according to the course of the common law," is still in effect in the State of Illinois, (Statement as to jurisdiction pp. 16 to 19; brief opposing motion to dismiss or affirm, pp. 15 to 29.) and no case is cited by Court or counsel, in which this Court, where the question was before it for its decision, has held to the contrary.

(3) The Seventh Amendment to the Federal Constitution Defines and Fixes the Right to Trial By Jury As It Is in the State of Illinois Today.

On the point of the Seventh Amendment the Court in its memorandum opinion cites *Pearson v. Yewdall*, 95 U. S. 294, 296 and *Minneapolis & St. L. Ry. Co.* v. *Bombolis*, 241 U. S. 211, 217. These two cases hold that the Seventh Amendment is not a restriction on the powers of the states. This we concede is the established law by the great weight of authority, but a possible different ruling is foreshadowed in the decision of this Court in *Chambers* v. *Florida*, 309 U. S. 227, foot note at the bottom of page 236.

But conceding, as we must under the present law, that the first eight amendments to the Federal Constitution restrict only the powers of the federal government and not of the state governments, we maintain that the Seventh Amendment is of controlling importance in the instant case for the following reasons:

The Seventh Amendment was binding law in the Territory of Illinois at the time that territory was admitted as a state in 1818. This amendment fixed and defined the right to trial by jury as it existed in the territory of Illinois at the time that it was admitted as a state. The right to trial by jury which was declared to be inviolate by the Constitution of Illinois of 1818, and the subsequent

constitutions of the State of 1848 and 1870, was the right to trial by jury as it existed in the territory of Illinois at the time the state was admitted to the union, and this right to trial by jury was fixed and defined by the Seventh Amendment to the Federal Constitution.

The cases cited by us in our statement as to jurisdiction (pp. 13 to 15) and in our brief opposing the motion to dismiss or affirm (pp. 44 to 49) establish beyond question the propositions that the Seventh Amendment was binding law in the Territory of Illinois at the time it was admitted as a state in 1818; that in addition to the Seventh Amendment the statutes of Congress and of the Territory of Illinois forbade the retrial in a court of review in that territory, of any question of fact once determined by a jury on conflicting evidence; that the right to trial by jury adopted by the first constitution of the State of Illinois, and the subsequent constitutions, was the right as it existed in the Territory of Illinois in 1818, including that right as determined and defined by the paramount law, which was the Seventh Amendment to the Federal Constitution.

The proposition stated in the last paragraph as to the effect on the right of trial by jury of the Seventh Amendmen, in the State of Illinois, or in any state similarly situated, that is in any state which at the time of its admission into the Union had a territorial form of government in which the Seventh Amendment was binding law, and the constitution of the state, which was required by congress as a condition for the admission of the state, and adopted by the state, provided that the right to trial by jury should remain inviolate, we believe is a new question, and one that has never been passed upon by this Court.

We wish to stress to the Court that points (2) and (3) are independent of each other, and that if the Court finds that either one presents a substantial federal question, there should be a full hearing of this case.

The Importance of the Instant Case.

By the state statute, which we are assailing, the fact finding body, for all practical purposes, has been changed from a common law, or constitutional, jury to a court of three men, having none of the characteristics of a jury. The decision of the judges on the facts is substantially final, as no verdict of a jury, not meeting with approval of the three judges, will ever be allowed to stand. An examination of the reports of the Appellate Courts of Illinois shows that of the cases that have been tried by jury that are reviewed by those courts, in one out of three, the verdict and judgment are interfered with by the Appellate Courts on disputed questions of fact. (Please see our statement as to jurisdiction pages 20-21.)

According to recent press reports, a trial judge in the City of Boston addressed a jury, who had just completed its month's service in his court in the language set out below. We quote the language solely because of the persuasiveness of its logic and reasoning:

"I am interested in the jury system because to me it means the bedrock of our civilization.

"I venture to say that a few years ago none of you would have thought that a situation could arise in the world whereby men would be dragged from their homes, tried by a tribunal, and next morning brought before a firing squad.

"No jury system is in operation where there is a dictator. So long as you have the jury system, your rights

will be protected—Your rights of free speech, to worship as you please and to live. What good are those rights if not protected by the right of trial by jury?"

We respectfully ask the Court to grant a rehearing in this case.

CHARLES C. SPENCER,
Counsel for Appellant.

RICHARD M. SPENCER,
Of Counsel.

Certificate of Counsel.

The undersigned counsel for appellant in the above entitled cause, does hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

CHARLES C. SPENCER,
Counsel for Appellant.